No. 718

FEB 21

CHARLES ELM

Supreme Court of the United States

In the Matter

of

The Petition of WILLIAM W. CONRAD, SAMUEL RUBIN and CLAIRE F. LESSER for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court the case of

MATTER OF DAVID BELL SCARVES, INC.,

Bankrupt.

CONRAD, RUBIN & LESSER,

Appellants,

HORACE G. PENDER,

Trustee in Bankruptcy, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DAVID J. COLTON,

Attorney for Petitioners.

THE COURT PRESS, INC.

INDEX.

PAGE

Petition 1
Basis for Court's Jurisdiction..... 13
Statutory Provisions to be Construed..... 13
The Question Presented..... 13
The Conflicting Decision..... 14
A. As to what constitutes contemplation of bankruptcy 14
B. As to the nature of the services rendered.... 15
Conclusion 18

TABLE OF CASES CITED:

Matter of Falk, 30 Fed. (2nd) 607 (C. C. A. 2nd Circ.) 9

In re Geller, 216 Fed. 558 (D. C. D. N. J.).....8, 15

Matter of Habegger, 139 Fed. 623 (C. C. A., 8th Circ.) .7, 16

In re Klein-Moffett, 27 Fed. (2nd) 444 (D. C. Md.)... 8
In re Kross, 96 Fed. 816 (D. C. S. D. N. Y.)..... 7

Quinn v. *Union National Bank*, 32 Fed. (2nd) 762 (C. C. A. 8th Circ.).....8, 16

Matter of Randolph, 190 U. S. 533.....5, 17
In re Rolnick, 294 Fed. 817.....6, 17

In re Stolp, 199 Fed. 488 (D. C. E. D. Wisc.).....8, 15

Tripp v. *Mitschrich*, 211 Fed. 424.....7, 14

In re Wood, 210 U. S. 246.....5, 17

OTHER AUTHORITIES CITED:

Section 240(a) of the Judicial Code..... 13
Section 60d of the Bankruptcy Act,
1, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 17, 18
Section 64b (3) of the Bankruptcy Act..... 4

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Appellants,

HORACE G. PENDER,

Trustee in Bankruptcy, Respondent.

To the Honorable Justices of the Supreme Court of the United States of America:

The petition of William W. Conrad, Samuel Rubin and Claire F. Lesser respectfully alleges:

1. That your petitioners, at the time of the commencement of these proceedings, were and now are residents of the State of New York, and the respondent was and is a resident of the State of New York.

2. Your petitioners are attorneys at law engaged in the practice of law in the City of New York. This proceeding involves the question of the jurisdiction of a referee in bankruptcy under §60d of the Bankruptcy Act, to re-examine the payment of certain fees to your petitioners for services

rendered to David Bell Scarves, Inc., a New York corporation, prior to the filing of a petition in bankruptcy against that corporation.

3. On October 31st, 1930, William W. Conrad, one of your petitioners, was consulted by David Bell, an officer of David Bell Scarves, Inc., in connection with matters relating to the financial condition of that corporation. It appears that the corporation had suffered large operating losses during the preceding six month period (Record, fol. 41). The condition of the business as of September 30th, 1930, the date of the most recent balance sheet (Record, fol. 52) indicated that the corporation had total assets of $65,827.90, of which about $6,000.00 was cash, $19,000.00 accounts receivable, $24,000.00 merchandise and $15,000.00 machinery and fixtures. The liabilities totalled $53,186.19, of which about $45,000.00 were accounts payable, $4,000.00 loans payable and $3,000.00 other obligations.

4. Your petitioners point out that that balance sheet (the correctness of which has never been questioned) indicated a solvent, but nevertheless unliquid, condition, a substantial portion of the assets being merchandise, machinery and equipment. Your petitioners having had considerable experience in such matters, they were retained by the corporation to conduct negotiations with the corporation's creditors and to endeavor to procure funds by the hypothecation of the accounts receivable in order to effectuate a reorganization of the corporation and a settlement with its creditors (Record, fols. 121, 132 and 133). Your petitioners agreed to perform such services for a fee of $2,500.00 which was paid on November 3rd, 1930 (Exhibit 7, Record, p. 51).

5. Your petitioners during the period between October 31, 1930, and November 17, 1930, were in practically continuous conferences with creditors and trade associations

representing creditors, some lasting until late hours of the evening (Record, fol. 125). As a result of these negotiations arrangements were made tentatively through a committee working in cooperation with the National Credit Men's Association for an adjustment of the corporation's obligations at 50% to be paid in cash (Record, fol. 144). The creditors' committee had, from the inception, been fully advised of the fees paid to your petitioners (Record, fol. 146).

6. After the foregoing arrangements had been worked out, and on November 17, 1930, three creditors saw fit to file an involuntary petition in bankruptcy against the corporation and it was, on November 21, 1930, adjudicated a bankrupt (Record, fol. 17). It appears that the claims filed total $50,174.45 (Record, fol. 115), and that the forced liquidation in bankruptcy realized less than $20,000.00 (Record, fol. 154), indicating a dividend of from 30 to 33⅓.

7. Your petitioners' functions were to endeavor to continue the corporation's business as a going concern and avoid the necessity of a forced liquidation which would be destructive both to the corporation and the interests of its creditors. The filing of a petition in bankruptcy destroyed the value of your petitioners' efforts which would have brought to the creditors an immediate payment of a sum substantially in excess of that which will ultimately be paid through the forced and destructive liquidation of the corporation's business in bankruptcy.

8. Upon the appointment of a trustee in bankruptcy, an application was made under Section 60d of the Bankruptcy Act to re-examine the payment made to your petitioners. Upon the hearing held before the Referee in Bank-

ruptcy, your petitioners objected to the jurisdiction of the Referee in that:

(a) The payment was not made in contemplation of the filing of a petition in bankruptcy by or against the corporation; and

(b) Because the services rendered by your petitioners were not such as were germane to the provisions of the Bankruptcy Act, and hence were not subject to re-examination and review in the summary manner provided for by Section 60d of that Act.

8a. The sole question presented in this proceeding is the construction of the provisions of Section 60d of the Bankruptcy Act. No question of the value of your petitioners' services is raised, your petitioners having, throughout the proceeding taken the position that the services rendered by them were not of such nature as to justify payment or allowance out of the bankrupt estate either under Section 60d or Section 64b (3).

9. The learned Referee, in spite of your petitioners' contention that no claim was made by them that their services were such as were entitled to payment under Section 60d, rejected your petitioners' contention that the services rendered were not within the scope of that Section and allowed your petitioners $500.00 for such services rendered by them and directed that they repay to the Trustee the sum of $2,000.00 as the property of the bankrupt estate (Record, fol. 172).

10. Upon petition to review the Referee's order, the same was confirmed by District Judge Francis G. Caffey, and upon leave granted by the Circuit Court of Appeals for the Second Circuit, an appeal was taken to that Court which affirmed the order of the District Court (Record, fol. 193).

11. The learned Judges of the Circuit Court of Appeals held, in an opinion written by Swan, *C. J.*, that the Court has jurisdiction to re-examine under Section 60d, even though the services which your petitioners were employed to render might not themselves be subject to any allowance. The Court rejected your petitioners' contention that where such services are of a nature not germane to the purposes of the Bankruptcy Act, they are not subject to summary re-examination by the Bankruptcy Court. Judge Swan's opinion reads in part as follows:

> "The appellants argue that 'it must necessarily follow' from the rule that only payments for 'germane' services are protected, that jurisdiction to re-examine a payment for services not 'germane' is lacking. This appears to be a plain *non-sequitur*. The premise is that as to services in no way beneficial to the estate or connected with the duties of a bankrupt, no compensation is allowable. The conclusion need not be, as the appellants urge, that none of the retainer is recoverable by the trustee under section 60(d); rather it may be that the whole of it is recoverable, as *In re Habegger* seems actually to have been held."

12. Your petitioners respectfully point out that this Honorable Court has definitely held that under Section 60d of the Bankruptcy Act, only such services as are beneficial to the estate are subject to compensation and that services rendered to a person who is subsequently adjudicated a bankrupt, of a different nature, such as the preparing of an assignment for the benefit of creditors, or endeavoring to resist adjudication, are not within the provisions of Section 60d.

In re Wood, 210 U. S. 246;
Matter of Randolph, 190 U. S. 533.

13. So far as your petitioners are able to ascertain, this Honorable Court has not passed upon the question whether the proper construction of Section 60d with respect to the jurisdiction to re-examine limits such jurisdiction to such cases as involve services which are subject to compensation. In this case, it is respectfully pointed out that Section 60d is one enacted for the protection of attorneys as well as of bankrupt estates, in that payments made to attorneys within the scope of the Section are protected against attack upon the ground that they constitute preferences. The question presented is whether the Court's jurisdiction to re-examine is to be construed as being broader than the Court's authority under the Section to make allowance for services rendered, the latter being concededly limited, under the decisions of this Court, to services which are of a nature beneficial to the estate. For example in the case of *In re Rolnick,* 294 Fed. 817 (Circuit Court of Appeals, Second Circuit) it was held that fees paid for the purpose of representing a debtor, who subsequently became bankrupt, in criminal proceedings, were not within the scope of Section 60d and were not subject to any compensation whatsoever thereunder. The Court, in that case, did not, however, pass upon the question of whether jurisdiction existed to re-examine such payment under that Section, no jurisdictional question having been raised. Such is the question now involved. In the present case your petitioners make no claim that their services were of benefit to the estate. The allowance of $500.00 was made by the learned Referee in what amounted to an *ex parte* proceeding, your petitioners resting upon their claim that the Referee lacked jurisdiction to re-examine under the circumstances.

14. Although the question has not heretofore been decided by this Court, it has been the subject of conflicting decisions in the various Circuit Courts of Appeals. It has

been held in the Eighth Circuit that no jurisdiction exists to re-examine with respect to fees paid prior to the filing of the petition in bankruptcy unless (a) the attorney was retained under circumstances which indicated a contemplation of bankruptcy and (b), that the attorney was retained to render services germane to the purposes of the Bankruptcy Act.

Tripp v. *Mitschrich,* 211 Fed. 424.

The Court, in the foregoing case, pointed out that in many of the adjudications jurisdiction had been assumed without objection, and that some of the decisions in which fees were re-examined could not be held to have bearing upon the question of the jurisdiction of the Court to so re-examine the same because no jurisdictional question was raised. In the *Tripp* case the question of jurisdiction was squarely raised and the Court held that Section 60d does not confer jurisdiction to re-examine payments of fees made under the circumstances therein disclosed. It appeared in that case that five days before the filing of an involuntary petition in bankruptcy, the bankrupt had employed an attorney to collect a fire loss upon a 30% contingent retainer. Prior to the adjudication a settlement was made with the insurance companies and the fee was retained out of the proceeds. The learned Court in the Eighth Circuit held that such fee could not be re-examined by reason of the fact that it did not fall within the scope of the provisions of Section 60d. It was similarly held in *Matter of Habegger,* 139 Fed. 623 (C. C. A. 8th Circ.) in which case it was held that services rendered by an attorney to a failing debtor in endeavoring to procure a composition with his creditors and in defending him in a criminal prosecution were not within the terms of Section 60d and hence could not be re-examined under that Section. Other decisions of similar purport are:

In re Kross, 96 Fed. 816 (D. C. S. D. N. Y.);

In re Stolp, 199 Fed. 488 (D. C. E. D. Wisc.);
In re Geller, 216 Fed. 558 (D. C. D. N. J.);
Quinn v. *Union National Bank,* 32 Fed. (2nd) 762 (C. C. A. 8th Circ.).

15. The learned Circuit Court of Appeals of the Second Circuit in the opinion in the present case recognized the diversity of opinion existing with respect to the interpretation of Section 60d. In the opinion of Judge Swan, it is stated:

> "It is true, however, that the section has not received a uniform interpretation by the courts, as this court recognized *In re Falk,* 30 F. (2d) 607, 609, and there are numerous dicta and a few decisions which seem to limit the literal language of the section. In an early case, *In re Kross,* 96 F. 816 (S. D. N. Y.), the question involved was the allowance of a fee under section 64(b) (3) 11 U. S. C. A. sec. 104 and in deciding it Judge Brown remarked that section 60(d) must be read with section 64(b) (3) and that both relate to the same character of services. * * * However, even though Judge Brown's dictum be repudiated, there remain several other opinions that import into section 60(d) a requirement that the services for which compensation is allowable thereunder shall be such as are 'germane to the aims of the Bankruptcy Act'. See *In re Habegger,* 139 F. 623 (C. C. A. 8); *In re Stolp,* 199 F. 488 (E. D. Wis.); *In re Rolnick,* 294 F. 817 (C. C. A. 2); *Quinn* v. *Union Nat. Bank,* 32 F. (2d) 762, 765, (C. C. A. 8); *In re Lang,* 20 F. (2d) 239, 241 (E. D. Pa.). Upon these authorities the appellants base their contention that a payment for services not 'germane' is not examinable under section 60(d)."

The cases to the contrary are:

In re Klein-Moffet, 27 Fed. (2nd) 444 (D. C. Md.);

Matter of Falk, 30 Fed. (2nd) 607 (C. C. A. 2nd Circ.).

16. The learned Judges of the Circuit Court of Appeals said in their opinion:

> "Section 60(d) would seem to require that, regardless of the nature of the services to be rendered, any retainer paid to an attorney when the debtor's impelling motive in paying it was the thought of the imminency of bankruptcy, should be subject to re-examination by the court. Whether upon such re-examination the court should allow him to keep a part of the retainer as a reasonable compensation for services actually rendered, even though the services were of a character that could not be of advantage to the creditors, such as defending the debtor against a charge of crime, we need not now say. Nor need we even go so far as to decide that a retainer for services of that character is subject to re-examination."

17. Your petitioners respectfully point out that the foregoing extract from the opinion of Judge Swan is inconsistent with the decisions of this Court that only services which are of advantage to the estate are within Section 60d in so far as that section authorizes allowance therefor. The necessary effect of the decision of the Circuit Court of Appeals is that all fees paid, where a bankruptcy is contemplated by the client, are subject to re-examination, even though not subject to allowance. Thus, valuable services might be rendered by an attorney, yet, when measured by the standard of advantage to the estate, must be held to be of no value and hence not subject to compensation. Such is the situation in which your petitioners find themselves. For concededly their services were not intended to be of value to the estate, should a forced liquidation be required.

18. Your petitioners further respectfully refer to the fact that the learned Circuit of Appeals held that the retainer of your petitioners was effectuated when the corporation necessarily contemplated bankruptcy proceedings. Your petitioners suggest that the record does not justify such conclusion. The condition of the business of the corporation indicated solvency, rather than insolvency, in the sense that the assets substantially exceeded the liabilities. The fact that a subsequent forced liquidation in bankruptcy realized less than 100% of the amount owing proves nothing, for such forced liquidation cannot be a proper measure of the value of the assets. The suggestion that the discussion of an equity receivership might indicate contemplation of bankruptcy is likewise without force in that such suggestion ignores the fact that an equity receivership is properly predicated upon the existence of a solvent, and not an insolvent, condition. The contemplation of the possibility (not the likelihood) of such proceeding falls far short of being a contemplation of the filing of a petition in bankruptcy by or against the debtor (the latter being the language of Section 60d).

19. Your petitioners respectfully urge that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

(a) Because of the important question of law involved, viz.: the construction of Section 60d of the Bankruptcy Act:

(b) Because the decision sought to be reviewed seems to be in conflict with the decisions of this Court to the extent that the decision of the Circuit Court of Appeals is predicated upon the theory that allowance may be made to an attorney for services rendered even though they do not benefit the bankrupt estate and hence that they are subject to re-examination;

(c) Because of the conflicting decisions in the various Circuits touching upon the questions here involved; and

(d) Because of the importance to members of the Bar and others similarly situated that their rights in connection with fees received under similar circumstances be determined.

WHEREFORE, your petitioners respectfully pray that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring this cause to this Honorable Court for such proceedings as may be just.

Dated, New York, February 20th, 1933.

WILLIAM W. CONRAD,
SAMUEL RUBIN,
CLAIRE F. LESSER.

DAVID J. COLTON,
Attorney for Petitioners.

State of New York,
County of New York—ss.:

WILLIAM W. CONRAD, SAMUEL RUBIN and CLAIRE F. LESSER, being duly sworn, each for himself, says: I have read the foregoing petition. The same is true to my knowledge, information and belief. My knowledge is derived from the record in this case and facts with which I am personally acquainted.

WILLIAM W. CONRAD,
SAMUEL RUBIN,
CLAIRE F. LESSER.

Sworn to before me this
20th day of February, 1933.

A. ALFRED CONRAD,
Notary Public,
New York County.

SUPPORTING BRIEF.

Basis for Court's Jurisdiction.

Jurisdiction in this Court is under Section 240(a) of the Judicial Code, the petition being for a Writ of Certiorari to the Circuit Court of Appeals to review an order which, under the Act of September 6th, 1916, is a final determination under the Bankruptcy Act subject to review by certiorari.

Statutory Provisions to Be Construed.

This application involves the construction of the provision of Section 60(d) of the Bankruptcy Act which reads as follows:

> "If the debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the Court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The Question Presented.

Briefly stated the question presented upon this application is whether or not, under Section 60(d) of the Bankruptcy Act, fees paid to an attorney for services to a corporation in connection with a proposed reorganization of the business and adjustment with its creditors, are sub-

ject to re-examination under that Section, if an involuntary petition in bankruptcy is subsequently filed, it being conceded that the services rendered were not of such nature as would be of benefit to the estate. Such services were rendered at a time when the corporation was solvent but was unable to meet its maturing obligations in cash. The facts, insofar as deemed appropriate to this application, are set forth in the foregoing petition.

The Conflicting Decisions.

Reference is made in the foregoing petition to the decisions in the various Circuits which seem to reach different conclusions with respect to the proper construction of Section 60(d).

A. *As to what constitutes contemplation of bankruptcy.*

The learned Circuit Court of Appeals in the present case indicated that the corporation must have contemplated the filing of a petition in bankruptcy. That such conclusion is not justified is borne out by a number of decisions in which it was held that the imminency of bankruptcy must be in the mind of the debtor in order to come within the provisions of Section 60(d). In *Tripp* v. *Mitschrich*, 211 Fed. 424 (C. C. A., 8th Circ.), Pope, *D. J.*, said, page 427:

> "The words 'in contemplation of bankruptcy' refer to the state of mind of the debtor, not of the attorney. This results from even a casual reading of the section. But what is meant by contemplation? We are of opinion that as here used it means more than a simple consciousness of insolvency. * * * Contemplation thus means more than the knowledge that a bankruptcy proceeding either by or against the debtor is impending. It means that in making the transfer the debtor is influenced by

> the possibility or imminence of such a proceeding. There must be some relation as of cause and effect between knowledge of his condition and the transfer."

Similarly in *In re Geller*, 216 Fed. 558 (D. C. D. N. J.), Haight, *J.*, said, page 562:

> "The fact that it might have occurred to the bankrupt, when he made the assignment, that proceedings in bankruptcy might thereafter be instituted either by or against him, and that the attorney to whom the collection of moneys was intrusted might deduct his fees therefrom, coupled with the fact that he afterwards attempted to do so, cannot be considered as a payment in contemplation of bankruptcy, such as is within the purview of Section 60d."

There are other cases of similar import referred to in the opinion of Swan, *C. J.*, submitted herewith.

B. *As to the nature of the services rendered.*

The Circuit Court of Appeals in the present case held that the right to re-examine exists regardless of the nature of the services which the attorney was engaged to render.

The Courts in other Circuits have held that the right to re-examine under Section 60(d) is limited to those cases in which the attorney is engaged to render services "germane to the purpose of the Bankruptcy Act." In *In re Stolp*, 199 Fed. 488 (D. C. E. D. Wisc.) the Court said:

> "The question as to the character of the services contemplated was directly involved in *In re Habegger* (C. C. A., 8th Circ.), 15 A. B. R. 198, 139 Fed. 623, and it was determined that they were such as were to be rendered in aid of the purpose sought to be accomplished by the Bankruptcy Act, to conserve and

> benefit the estate of the bankrupt, and therefore inure to the benefit of creditors; and accordingly a payment or transfer from a failing debtor for services to be rendered in endeavoring to get a composition with creditors, and in defending the failing debtor in a criminal prosecution, was not within the terms of this section."

The Court adopted the rule in the *Habegger* case (139 Fed. 623; C. C. A., 8th Circ.) and said:

> "I am aware that this restricted view will also affect the application of the remedy provided in section 60d strictly to such cases as appear to be payments for services to be rendered, when such services are admitted or adjudicated to be of the character specified, namely, services germane to the purposes of the Bankruptcy Act; and when it appears that the service to be rendered was not of such a character, the right to review cannot be exercised, but the transaction must either stand or be attacked under some other provision of the Bankruptcy Act."

Similarly, in *Quinn* v. *Union National Bank*, 32 Fed. (2nd) 762 (C. C. A., 8th Circ.), Kenyon, *C. J.*, said (p. 765):

> "It is the purpose of Section 60d of the Bankruptcy Act to permit a party to secure the services of attorneys to be rendered in connection with the bankruptcy proceedings, and said subdivision d relates to services germane to the bankruptcy proceedings. * * * The test laid down by Judge Adams in *Re Rosenthal and Lehman* (D. C.) 120 Fed. 849, is whether or not the services are rendered in good faith for the purpose of administering the act in a way to carry out the purpose of its enactment."

Although the Circuit Court of Appeals of the Second Circuit has heretofore held that only services germane to

the aims of the Bankruptcy Act are subject to compensation under Section 60(d), it has not, prior to the present case, held that fees paid for services rendered, of whatsoever nature, are subject to re-examination.

In *In re Rolnick*, 294 Fed. 817 (C. C. A., 2nd Circ.), the Court said, page 819:

> "The act recognizes the right of the debtor to have the aid and advice of counsel, and to make provisions for a reasonable compensation to his counsel for *services which are germane to the aims of the Bankruptcy Act*, subject, however, to the right of the Court, if the Trustee or any creditor questions the transaction to re-examine it, with a view to determining the reasonableness of the amount paid. *In re Wood*, 210 U. S. 246. *But the services to be rendered, we think, must be germane to the aims of the Bankruptcy Act and they must be rendered prior to the institution of the bankruptcy proceedings to make Section 60d applicable.*"

The effect of the decision in the instant case is to extend the scope of the application of Section 60(d) to fees paid for any legal services without extending the scope of the Court's power to make allowance for the value of the services rendered which may not be germane to the purpose of the Bankruptcy Act.

That allowance may not be made, under Section 60(d), for services other than those which are of benefit to the estate has been determined by this Court in:

> *Matter of Randolph*, 190 U. S. 533;
> *In re Wood*, 210 U. S. 246.

In the *Randolph* case it was held that services rendered by an attorney in preparing an assignment for the benefit

of creditors are not within the scope of Section 60(d). Mr. Justice Holmes said (p. 539):

> "We are not prepared to go further than to allow compensation for services which are beneficial to the estate."

Reference is made in the opinion of Swan, *C. J.*, to the conflicting decisions. It is respectfully urged that the present case is one which justifies the allowance of a writ of certiorari to the end that the applicability of Section 60(d) to cases in which attorneys are engaged to render services not in actual contemplation of bankruptcy and not for purposes germane to the aims of the Bankruptcy Act may be finally determined.

Respectfully submitted,

DAVID J. COLTON,
Attorney for Petitioners.